Federal Court  Cour fédérale

Date: 20240318

Docket: T-1153-22

Citation: 2023 FC 1239

Ottawa, Ontario, March 18, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

GAIL COLLINS

Applicant

and

SADDLE LAKE CREE NATION #462

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] Gail Collins [or the Applicant] is a member of Saddle Lake Cree Nation #462 [SLCN #462]. From Canada's perspective, SLCN #462 is a "band" recognized under the *Indian Act*, RSC 1985, c I-15 [*Indian Act*] and a Treaty 6 nation. At the local level, however, SLCN #462 is constituted of two different communities, Saddle Lake Cree Nation #125 [SLCN #125] and Whitefish Lake First Nation #128 [WLFN #128]. WLFN #128 and SLCN #125 have distinct

funding agreements and thereby operate separately. In the following reasons, the reference to SLCN #462 is in relation to the "band" recognized by the federal government consisting in both SLCN #125 and WLFN #128.

[2] SLCN #125 and WLFN #128 conduct separate elections and at different times, under the same *Saddle Lake Tribal Custom Election Regulations* [Election Regulations]. Members vote in either election, depending on where they reside, but cannot vote in both elections. Each separate election leads to the formation of a different band council in each community, but all elected officials in each community together form SLCN #462's band council for Canada's purposes. The Election Regulations were approved by Band meetings in 1955 and 1960.

[3] SLCN #462 does not control its membership list. Under section 11 of the *Indian Act*, the federal government may add individuals to the membership list. Ms. Collins is a member of SLCN #462 and is seeking the right to vote in the SLCN #125 election.

[4] The Election Regulations enacted in the late 1950s contain an exclusion on the right to vote: "Red Ticket Indians" are not allowed. This exclusion originates from a pre-1985 provision of the *Indian Act* that prevented an Indian woman from maintaining her status and transmitting it to her children if she was married to a non-status man (*McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 at para 21) [*McCarthy*].

[5] In 1985, Parliament amended the *Indian Act*. Those amendments, included in Bill C-31, intended to remedy the historical discrimination and re-enfranchise all women and their children. The "Red Ticket Indian" category of individuals no longer exists.

[6] Nevertheless, in the June 2022 SLCN #125 election, and those held previously, women who were re-enfranchised under Bill-C-31 were still disallowed to vote under the still applicable Election Regulations, which provide at section 2(a):

> Any Band member, over the age of 21 years on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote; with the exception of Red Ticket Indians.

[7] Ms. Collins is affected by the provision. She is a member of SLCN #462/SLCN #125. She was born of the union of a Metis father and a mother who was born with Indian status. Because her mother married a non-Indian, her mother lost her status in 1963 and could not transmit her Indian status to the Applicant at birth. Section 2(a) therefore applies to the Applicant, as she was included within the meaning of the term "Red Ticket Indian", a category that no longer exists. The term "with the exception of Red Ticket Indians" included within section 2(a) of the Election Regulations will be referred to in these reasons as the "Voting Prohibition."

[8] Ms. Collins seeks judicial review of the SLCN #462/SLCN #125's electoral process. Specifically, she seeks judicial review of the Election Officer's decision to deny her the right to vote. Moreover, she seeks a declaration that the Voting Prohibition is constitutionally invalid as it is in breach of section 15 of the *Charter of Rights and Freedoms* [the *Charter*] and cannot be saved under section 1. Ms. Collins also submits that the Voting Prohibition is not a SLCN

#462/SLCN #125 custom and therefore section 25 of the *Charter* cannot override the section 15 breach. In any event, even if section 25 did apply, the discrimination in this case is based on sexual grounds, and section 28 of the *Charter* precludes SLCN #462/SLCN #125 from relying on any custom established under section 25 to discriminate on the basis of sex.

[9] Shortly before the hearing, Justice Favel of this Court rendered his decision in the matter T-800-21, which is the *McCarthy* decision. The impugned Election Regulations and Voting Prohibition in this case are the same that apply to WLFN #128. In the *McCarthy* decision, Justice Favel declared the Voting Prohibition unconstitutional as it breached section 15 of the *Charter* and could not be justified under section 1, nor shielded by section 25 of the *Charter* because it was not a custom of the band.

[10] Both parties concede that Justice Favel's decision applies in this case. Considering the principle of comity, I am required to apply Justice Favel's decision in *McCarthy*, unless I am convinced that the decision is distinguishable or manifestly wrong (*Dleiow v Canada (Citizenship and Immigration*), 2020 FC 59 at para 8; *Apotex Inc v Pfizer Inc*, 2013 FC 493, [2013] FCJ No 562 at paras 16-17). In my view, Justice Favel's decision is correct. Subject to the following clarifications and distinctions, I agree with Justice Favel and adopt his reasoning. This application for judicial review is therefore granted.

II. Factual background

A. *The Band*

[11] SLCN #462 is a Treaty 6 signatory band. SLCN#125 and WLFN#128 are the reserves or communities of SLCN #462, which is the "band" recognized by the federal government under the *Indian Act*. Located in the region of central Alberta, SLCN #462 has a registered population of 11,146 members, including more than 8,500 in SLCN #125.

[12] SLCN #125 and WLFN #128 identify as separate communities, and hold elections separately under the same Election Regulations, namely the "*Saddle Lake Tribal Customs Election Regulations*" which were passed at Band meetings in 1955/1960. While all members are members of SLCN#462, at the local level, each member vote in either SLCN #125 or WLFN #128, depending on their residence.

B. *The Applicant*

[13] The Applicant, Gail Collins, is a registered member of SLCN #462/SLCN #125. She was born of the union of a Metis father from St. Paul des Metis and a mother who was born with Indian status from SLCN #462. Her maternal grandparents were all registered SLCN #462 members but because her mother married a non-Indian, Gail Collins' mother lost her status in 1963.

[14] Gail Collins and Terra McCarthy's (the Applicant in the *McCarthy* decision) mothers were amongst the few thousands of members who lost their status with the enactment of the *Indian Act* and who were referred to as "Red ticket Indians" according to the Election Regulations.

[15] The origin of the term "Red ticket Indians" was discussed in several cases. In *Daniels v Canada (Indian Affairs and Northern Development)*, 2013 FC 6 at paragraphs 460, 461, this Court explained that in 1869, the federal government adopted the *Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6, that included a provision disenfranchising Indian women who married out, but allowed them to continue receiving an annuity. An administrative practice arose of issuing those women identity cards known as "red tickets". By 1951 and after other amendments to the *Indian Act*, these "Red Ticket" women were required to commute their annuities and leave the reserve.

[16] In 1985, Bill C-31 was enacted to allow Indigenous women that had "married out" of their Indian status to regain status and transmit it to their children. All women and their descendants that had lost (or never obtained) status by the earlier provision disenfranchising Indian women who married a non-Indian were re-enfranchised. The "Red Ticket Indian" category was abolished. The Applicant's mother as well as Terra McCarthy's mother were reinstated as members of their communities and both Applicants received Indian status and SLCN #462 membership.

[17] Moreover, as part of the Bill C-31 enactment, and pursuant to section 10 of the *Indian Act*, bands were given the ability to take control of their own membership list. SLCN #462 made the decision not to control its own membership list. SLCN #462 is therefore a "section 11 band" under the *Indian Act* meaning that the federal government may add individuals to the SLCN #462's membership list in accordance with section 11 of the *Indian Act* (*McCarthy* at para 20).

C. *Election Regulations*

[18] Although they are one "band" recognized by the federal government, SLCN #125 and WLFN #128 operate their elections separately, but under the same Election Regulations. Nine councillors are elected for the SLCN #125 reserve and four councillors are elected for the WLFN #128 reserve. The Chief is elected amongst the elected councillors. Residents of SLCN #125 are only allowed to vote for a Chief and councillors of SLCN #125 and the same rule applies to the band members residing in WLFN #128. Band council representing SLCN #462, the "band" recognized by the federal government that includes both SLCN #125 and WLFN #128, consists in the nine councillors elected for SLCN #125, and the four councillors elected for WLFN #128.

[19] As stated, the Voting Prohibition is included in section 2(a) of the Election Regulations and was in effect at the time of the June 2022 election. It provides that:

> Any Band member, over the age of 21 years on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote; with the exception of Red Ticket Indians.

[20] Because of that provision, and in spite of the enactment of Bill C-31 and the elimination of the category of "Red Ticket Indian", the Respondent has and continues to refuse the right to

vote and the right to seek nomination in Chief and Council elections to members who regained status in 1985, such as the Applicant.

[21] A process to amend the Election Regulations was commenced by the previous Chief and Council but had not been completed at the time of the June 2022 election. Specifically, it had yet to be approved by Band membership. With regards to the eligibility to vote, the proposed amendments would change the language of the current section 2(a) to remove the exclusion for "Red Ticket Indians". In other words, section 2(a) would be amended to remove the Voting Prohibition:

> Any Band member, over the age of 21 years on the day of the election, whether living on the Reserve or not, shall be eligible to cast a single ballot.

D. *The 2022 Election*

[22] On April 22, 2022, the Chief and Council handed out a "Notice-voter Registration 2022" [the Notice] requiring those not recognized as members resident in SLCN #125 to apply to vote.

[23] In this Notice, the Chief and Council insisted that those "not recognized as members of SLCN" provide a letter outlining their "genealogy" and appear before a panel to review their application to vote.

[24] On or about May 6, 2022, the SLCN #462/SLCN #125 called an election for June 15, 2022. Mr. Steve Wood was appointed as the Election Officer.

[25] The Applicant first attempted to demonstrate her genealogy pursuant to the instructions set out in the Notice after the election was called. On or about May 6, 2022, she wrote a letter to Chief and Council objecting to this Notice and asking that she be confirmed as a member resident of SLCN #125.

[26] On May 24, 2022, she wrote a second letter to Council in which she asked to have her name included in the voters' list for the 2022 SLCN #125 Chief and Council election. In this letter, she also explained that the requirements sought by Council (genealogy or other documentation, appear before a panel, etc.) did not comply with the Election Regulations and breached her right to procedural fairness. She also emphasized on the fact that the practice of preventing Bill C-31 members from voting is discriminatory and was currently in a proceeding before the Federal Court in the File T-800-21 (the *McCarthy* decision).

[27] On June 1, 2022, the Election Officer announced that Bill C-31 members would not be allowed to vote or to seek nomination in the June 15, 2022, Election. The Applicant had not received any responses to her two letters at that point in time.

[28] On June 15, 2022, on the day of the election, the Applicant went to the polling station located in the SLCN #125 reserve and attempted to vote. However, she was told by the membership clerk Claudia Makokis that she was not allowed to vote, without further reasons.

[29] The Applicant is now challenging the June 1, 2022, decision of the Election Officer to refuse Bill C-31 members the right to vote or to seek nomination in the election that was held on

June 15, 2022. She is also challenging this practice on the basis that it is unconstitutional and discriminatory.

III. Questions and standard of review

[30] There are essentially three issues before this Court:

1) whether there was a "decision" in this matter giving rise to the Court's jurisdiction under section 18.1 of the *Federal Courts Act* (R.S.C., 1985, c.F-7) [*Federal Courts Act*]

2) If the Court has jurisdiction to rule on this application whether the decision of the Election Officer is reasonable; and

3) whether the Voting Prohibition is in breach of section 15 of the *Charter*.

[31] The first issue is jurisdictional in nature. If the Court determines that it does not have jurisdiction to consider this application, that is the end of the legal proceeding.

[32] On the second issue, the challenge to the Election Officer's decision is on administrative law grounds. Typically, the standard of review applicable to an administrative decision maker's interpretation of their enabling statute is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]), which in this case includes the Election Officer's decision on the interpretation of the Election Regulations. As held by this Court in *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 20, deference applies to Indigenous decision makers' interpreting their own Indigenous laws: "decisions of First Nation election appeal bodies must be reviewed on a standard of reasonableness, including when they are interpreting the provisions of an Election Code". At paragraph 27, the Court continued and

opined that the justifications for deference "apply with equal force when the question at issue involves the interpretation of written Indigenous law."

[33] In this case, however, and contrary to *McCarthy*, the Applicant specifically raised the issue of discrimination in her letter dated May 24, 2022, to the Election Officer, and submitted that the Voting Prohibition was invalid. Therefore, in assessing the reasonableness of the Election Officer's decision, the principles of *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], *Loyola High School v Québec (AG)*, 2015 SCC 12 [*Loyola*] and *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU*] apply. The decision maker must demonstrate that in "assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*TWU* at paras 57-58; *Doré* at para 57; *Loyola* at para 39).

[34] In the *McCarthy* decision, the decision maker did not consider the *Charter* issue. Justice Favel therefore applied the Ontario Court of Appeal's decision in *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*] at paragraph 35, ruling that a decision maker's refusal or failure to consider an applicable *Charter* right is a "general question of law of central importance to the legal system as a whole" that is subject to the standard of correctness (*Ferrier* at para 35, citing *Vavilov* at para 17). While the discussion is academic, when an administrative decision maker did not consider an issue, there are no reasons to "defer to". In that sense, no "standard of review" applies, and the recourse is simply to rule that the decision maker failed to consider a relevant ground, and the decision is remitted back for re-determination. Alternatively, in some circumstances, the Court may accept new arguments and rule on them,

thereby substituting judgment, rather than applying a "standard of review." In the end, the operation remains equivalent to applying a standard of "correctness."

[35] On the third issue, the question is whether the Voting Prohibition is constitutionally invalid under section 15 of the *Charter*. The Court has jurisdiction to declare a First Nation's election law, even a customary one, unconstitutional and of no force and effect (*Janvier v Chipewyan Prairie First Nation*, 2021 FC 539 [*Janvier*] at para 33). As held in *Janvier* at paragraph 18: "constitutional issues, such as allegations that legislation breaches the Charter, are reviewed on a correctness standard" (citing *Vavilov* at paras 55-57).

IV. Issue #1: Is there a "decision" by the Electoral Officer giving jurisdiction to the Court?

A. *Respondent's position*

[36] The Respondent submits that even though a band council qualifies as a federal "board, commission or other tribunal" for the purposes of section 18.1 of the *Federal Courts Act*, the circumstances challenged in this application are not based on a "decision," "order" or a "continuing course of conduct" pursuant to section 18.1(2) of the *Federal Courts Act* or Rule 302 of the *Federal Courts Rules* (SOR/98/106) [*Federal Courts Rules*] and therefore, the Court does not have jurisdiction to hear this judicial review.

[37] In this case, the Election Officer made an "announcement" at a nomination meeting on June 1, 2022, that Bill C-31 Members could not vote or seek nomination in the June 15, 2022, election. The Respondent submits that the "announcement" is not a "decision". Moreover, the

other events leading to the election are also not "decisions" for the purposes of the *Federal Courts Act*. Rather, the letters and actions taken by the Applicant, and the position taken by the Respondent, are merely expressions of a decision previously made that Bill C-31 Members did not have the right to vote or be nominated for the election when the Voting Prohibition was adopted in 1955/1960.

[38] The Respondent argues that the June 1, 2022, announcement that C-31 Members would not be permitted to vote in the election is not a "decision" under section 18.1(2) of the *Federal Courts Act* because it was not a new exercise of discretion in relation to new facts. Rather, it was an expression or reiteration of the eligibility rule set out at section 2(a) of the Election Regulations, and a practice that the Applicant acknowledges has been consistently carried out by previous band councils.

[39] Relying on a consistent line of jurisprudence (*Francoeur v Canada (Treasury Board)*, 2010 FC 121, at paras 13 and 16, *Moresby Explorers Ltd. v Gwaii Haanas National Park Reserve*, 2000 CanLII 16549 at para 15, *McLaughlin v Canada (Attorney General)*, 2022 FC 1466, [2022] FCJ No 1488 at paras 22, 47, *Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at paras 35-38, and *Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 1995 CarswellNat 1430 [1995] FCJ No 982 at paras 1-2), the Respondent submits that judicial review is not available where the "decision" being challenged is not a new exercise of discretion, but rather a communication affirming a pre-existing decision, rule or policy. In all the cases cited, an exchange of letters or correspondence between an individual and a decision maker showing attempts to reverse a negative decision, on an issue previously decided by that decision maker,

did not give rise to a “new decision” or a “course of conduct” subject to judicial review. In the Respondent’s view, given that the “decision” not to allow Bill C-31 Members to vote was made when the Voting Prohibition was adopted, no new exercise of discretion was made in June 2022 and therefore there is no “decision” to ground the jurisdiction of the Court.

B. *Applicant’s position*

[40] The Applicant argues that the June 1, 2022, announcement that Bill C-31 Members would not be allowed to vote or seek nomination in the June 15, 2022, election consists in a “decision” pursuant to section 18.1(2) and subject to the jurisdiction of the Court.

[41] Alternatively, the Applicant asserts that the following events together constitute a “decision” or a “continuing course of conduct” under Rule 302 of the *Federal Court Rules* and that the Court thereby has jurisdiction to hear the matter :

A. The Notice – Voter Registration 2022;

B. Council’s non-response to the Applicant’s Objection Letters sent to the Election Officer dated May 6 and May 24, 2022, claiming entitlement to vote in the election;

C. The Applicant’s attempt to demonstrate her genealogy under the purported registration process and appear before a “panel” which she was never able to do because the Election Officer never responded to her request (see para 45-46 of the applicant’s factum);

D. The electoral officer’s June 1, 2022, announcement that Bill C-31 Members would not be entitled to vote and seek nomination in the election;

E. The Applicant attempted to vote at the election on June 15, 2022, but was denied a ballot by Ms. Claudia Makokis, who is the Respondent’s membership clerk.

C. *Analysis*

[42] The Respondent rightly concedes that this Court has jurisdiction over band council decisions even if the decision originates from the band's customs. Indeed, the Federal Court has jurisdiction to review First Nation's elections processes, including those under Indigenous customary laws (*Thomas v One Arrow First Nation*, 2019 FC 1663 [*Thomas*] at para 14; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 35, 40; *McCarthy* at para 51; *Shanks v Salt River First Nation #195*, 2023 FC 690 at para 30; *Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 at paras 26-28, 59; *Bellegarde v Carry the Kettle First Nation*, 2023 FC 86 at paras 14-15).

[43] On the issue of whether there was a "decision" that grounds the jurisdiction of this Court, the cases cited by the Respondent to the effect that correspondence between an applicant and a decision maker does not constitute a "decision" for the purposes of section 18.1 of the *Federal Courts Act* are distinguishable on their facts. In those cases, the applicants had been the recipient of an individualized decision and an application for judicial review was not brought within the applicable 30-day time limitation under section 18.1(2) of the *Federal Courts Act*. Instead of seeking an extension of time, those applicants wrote correspondence to the decision maker to solicit a reconsideration, or to "create" a second decision on which an application for judicial review could be made. In those cases, the Court held that the correspondence did not lead to a fresh exercise of discretion on the basis of new facts and therefore the correspondence was not a new "matter," "decision" or "course of conduct" giving rise to the Court's jurisdiction.

[44] In this case, and contrary to the decisions cited by the Respondent, the correspondence between the Applicant and the Election Officer are not in relation to an individualized decision made earlier *by the same decision maker in relation to the same applicant, on the basis of the same evidence and arguments.* While the Voting Prohibition applicable to Bill C-31 Members did exist since 1955/1960, the request by the Applicant was a new one made to the Election Officer, who himself is a different decision maker as compared to the election officer that had been appointed in previous elections.

[45] In this particular case, the Election Officer had the power to consider and determine the Applicant's request to vote. Indeed, an administrative decision maker that has the power to construe its enabling powers, or questions of law, also has the power to consider their constitutional validity (*R. v Conway*, 2010 SCC 22 at para 78). As a decision maker in relation to the Voting Prohibition, the Election Officer had the power to assess the Applicant's request on discrimination grounds, rule that the prohibition on voting to Bill C-31 Members was discriminatory and inapplicable, and grant the Applicant the right to vote (*Fort McKay First Nation v Laurent*, 2009 FCA 235, at paras 57–67; *Linklater v Thunderchild First Nation*, 2020 FC 1065 [*Linklater*] at para 34; *Perry v Cold Lake First Nations*, 2018 FCA 73 at para 45 [*Perry*]).

[46] Moreover, and contrary to the cases cited by the Respondent in which the same applicant was seeking judicial review of the same decision, that is not the case here. There is no evidence that the Applicant ever challenged the Voting Prohibition, nor that the particular Election Officer ever decided the issue. It is trite law that an administrative decision maker is not bound by

decisions made by the same administrative body in the sense known as *stare decisis* (*Vavilov* at para 129). The Election Officer therefore had the power, and had to determine the issue raised by the Applicant.

[47] In my view, the events noted by the Applicant, including the April 22, 2022, Notice and the ultimate refusal to issue a ballot on election day to the Applicant, constitute together "decisions" that are sufficient to ground the jurisdiction of the Federal Court. As held by Justice McVeigh in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 [*Shirt #1*], in relation to the Election Regulations of SLCN #462 (applicable in SLCN #125) and this Court's jurisdiction on the election process as a whole:

> [3] This Court would prefer not to interfere with the democratic process of the SLCN out of respect for their right to determine their own elections. However, sometimes it is necessary and it can be helpful to hear what you already know. The Election Regulations have not changed since 1960 and though they may have been sufficient at the time, they are certainly lacking now.
>
> [4] The Federal Court has supervisory jurisdiction over the election process including electoral bodies such as an appeal committee and electoral officers (*Algonquins of Barriere Lake v Algonquins of Barriere Lake (Council)*, 2010 FC 160 at paras 105-106).
>
> [Emphasis added.]

[48] The events in this case are not dissimilar to the events in *Thomas.* In that case, the "decisions" included one by the election officer to remove the Applicant's name from the ballot, one by Council not to take any further steps, and a refusal by the Chief to resign. As in this case, none of those decisions were made in writing, and none provided reasons to the Applicant. In ruling that the Court had jurisdiction, Justice Grammond held that:

> [14] These three decisions were intimately related to the electoral process. There can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws, including where these laws are said to be "customary." See, for example, *Canatonquin v Gabriel*, 1980 CanLII 4125 (FCA), [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paragraphs 96–106.
>
> [Emphasis added.]

[49] Likewise, in this case, the five related events resulting in the Applicant being unable to vote relate to the Respondent's electoral process, and together constitute a "decision" for the purposes of section 18.1 of the *Federal Courts Act*. As the Court has jurisdiction to review a First Nation's electoral process, even if conducted under custom, the Court has jurisdiction in this case.

[50] Moreover, even if there had not been a "decision", the Court has jurisdiction on another basis. This application for judicial review seeks a declaration on the constitutional validity of the Voting Prohibition. Pursuant to section 18.1 of the *Federal Courts Act*, the "matter" of the application therefore relates to the constitutional validity of the Voting Prohibition that was adopted by SLCN #462/SLCN #125. In *Pittman v Ashcroft First Nation*, 2022 FC 1380, one of the issues raised was whether the Court had jurisdiction to hear a challenge on the constitutional validity of a band council resolution adopted many years earlier. Justice Grammond held at paragraphs 65-66 that the constitutional validity of legislative enactments, such as the Voting Prohibition in this case, "can always be submitted to the Courts, even though many years have passed since the enactment of the challenged statute" (relying on *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134–135, [2013] 1 SCR 623). Likewise, the Court has jurisdiction in this case to rule on the constitutional validity of the Voting Prohibition,

regardless of whether a "decision" is impugned, and no time limitation applies to such application.

V. Issue #2: Is the Electoral Officer's decision reasonable?

[51] The reasonableness of the Election Officer's decision can be determined summarily. In *Vavilov*, the SCC held that the reasonableness of a decision is assessed through its intelligibility, transparency and justification (*Vavilov* at para 81). When a Charter provision is at play, reasonableness requires specific considerations. The Election Officer's decision needs to demonstrate "a proportionate balancing of the *Charter* protections at play" along with the objectives of the Election Regulations, for it to be considered reasonable (*TWU* at para 58; *Doré* at para 57; *Loyola* at para 39).

[52] Reasons are the means by which reasonableness and proportionate balancing may be demonstrated. However, reasons are not always necessary (see *TWU* at para 55). When no reasons are available, the Court must look at the record to assess the reasons that "could be offered in support of a decision" (*TWU* at para 56; *Vavilov* at paras 85, 97, 102-103; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para 11; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at paras 32-33, 38). The record must demonstrate that the decision maker's ruling amounted to a proportionate balancing of the *Charter* right with the objectives of the statutory mandate (*TWU* at paras 55-56, 82; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para 52, quoting *Newfoundland Nurses* at para 15).

[53] In this case, while the Applicant specifically raised the issue that the Voting Prohibition was discriminatory, the Election Officer did not provide reasons demonstrating a "proportionate balancing of the Charter protection with the statutory mandate," in this case with the Election Regulations (see *TWU* at para 79, *Doré* at para 7; *Loyola* at para 32).

[54] Moreover, there is nothing in the record demonstrating any consideration of the issue. Indeed, the Election Officer simply referred to the existence of the Voting Prohibition and, on the basis of its text and without analyzing whether that text still applied (after Bill C-31) or if it was constitutionally valid, simply applied it and denied the Applicant's right to vote. The Election Officer had the power to consider the constitutional validity of the Voting Prohibition, because there is no explicit exclusion of that power in the Election Regulations (*Linklater* at para 34; *Perry* at para 45).

[55] Consequently, for those reasons, the decision is unreasonable because neither the reasons nor the record demonstrate any attention or consideration of the question as framed by the Applicant (see *Canada (Attorney General) v Robinson*, 2022 FCA 59 at paras 27-28; *Vavilov* at paras 81-87, 128, 133; *McCarthy* at para 95).

VI. Issue #3: Is the Voting Prohibition constitutionally invalid under section 15 of the *Charter*?

A. *Section 32 of the Charter of Rights and Freedoms applies to the Voting Prohibition*

(1) Applicant's position

[56] At the hearing, the Applicant argued that the *Charter* applied to the Election Regulations, pursuant to section 32 of the *Charter*. While some Indigenous nations dispute whether the *Charter* applies in relation to governance, including decisions made under self-government or customary powers, the Applicant relied on *Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*] at paragraph 38, for the proposition that "protection for aboriginal peoples from violations to [*Charter*] rights and freedoms by their own governments" is required. Otherwise, if the *Charter* does not apply, it "would […] create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens" (para 39).

(2) Respondent's position

[57] At the hearing, the Respondent did not submit that the Election Regulations were not subject to the *Charter*. Indeed, the SLCN #462 made no arguments whatsoever on the application of the *Charter*, leaving the issue to the Court.

(3) Analysis

[58] In *McCarthy*, Justice Favel held that section 32 of the *Charter* did apply to the Election Regulations because WLCN #128 was a "government" or carried on functions of "governments," regardless of the source of the power giving rise to the Election Regulations (para 116). Justice Favel also opined that section 32(1) of the *Charter* applied to Indigenous nations exercising an inherent self-government right and to Indian bands exercising governmental authority under the *Indian Act* (paras 129-133).

[59] I agree with Justice Favel's analysis, to which I add the following justification.

[60] The *Charter* applies to decisions made by Indigenous nations regardless of the "source" of their powers. The promise made to all Canadians, within the *Charter*, is that all are protected from the imposition of any power, by any governing authority, regardless of the source of that power. It is because of the "nature" of the power exercised, one that is compulsory and can be imposed on others, that the application of the *Charter* is triggered (*Horse Lake First Nation v Horseman*, 2003 ABQB 152 [*Horse Lake*] at paras 12-19, 27-29).

[61] The Constitution (including the *Charter*) must be interpreted as a whole in a large, liberal and purposive manner, in its appropriate linguistic, philosophic and historical context ((*Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 14; *Quebec (Attorney General) v 9147-0732 Québec inc*., 2020 SCC 32, at paras 8-10, 68; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 4; *Hunter v Southam Inc*., 1984

CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v Big M Drug Mart Ltd*., 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295). The constitutional provision must be capable of growth. However, the interpretation must not overshoot the right. Therefore, the text of the constitutional provision is very important and its content is the starting point of the purposive approach.

[62] A provision of the *Charter* must not be interpreted in isolation. Rather, the terms of the *Charter* must be interpreted coherently and contextually, together with other parts, and consistent with the internal architecture of the Constitution as a whole (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 50; *Dubois v The Queen*,[1985] 2 SCR 350 at p. 365; *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 80). An interpretation should also favour one that does not make the provision redundant (Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; Ruth Sullivan, *Construction of Statutes*, 7th ed (LexisNexis, 2022) at 211; see also *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 59, 82).

[63] Section 32 of the *Charter* provides that:

Application of Charter	**Application de la Charte**
32 (1) This Charter applies	**32 (1)** La présente charte s'applique :
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and	**(a)** au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.	**(b)** à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

[64] The issue relating to the application of the *Charter* to rules enacted by Indigenous nations arises as a result of the terms of section 32, which specifically apply to Parliament and Legislatures, as well as all matters within the authority of the federal and provincial governments. Section 32 does not specifically apply to decisions made by Indigenous nations under their inherent self-government or other regulatory powers.

(a) *Historical perspective relating to the application of the Charter to Indigenous governance*

[65] The controversy relating to the application of the *Charter* to Indigenous governments is less acute when the impugned rule is made pursuant to a power identified in the *Indian Act*. For example, band councils may enact by-laws under section 81 of the *Indian Act* over various subjects specifically identified therein. Since the *Charter* applies to the *Indian Act*, it therefore applies to any power exercised under it. Similarly, municipalities also exercise legislative powers under provincial laws delegating powers to municipal councils. Section 32 applies to municipal governments (*Godbout v Longueuil (City)*, [1997] 3 SCR 844 [*Godbout*]; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 [*Greater Vancouver*]). While municipal governments cannot be compared to Indigenous nations from a sociological standpoint, band councils exercising powers under the *Indian Act* similarly fit within the meaning of section 32.

[66] From a historical perspective, that conclusion is not controversial. Historically, band councils were seen as either exercising a legislative power under the *Indian Act*, or even considered to be an agent or arm of the Minister.

[67] Shortly after the adoption of the *Charter*, in *Whitebear Band Council v Carpenters Provincial Council of Saskatchewan and Saskatchewan Labour Relations Board*, 1982 CanLII 2582 (SK CA), [1982] S.J. No. 312 at paragraphs 13, 14, 19, the Saskatchewan Court of Appeal compared Indian band councils with municipal governments, holding that band councils were "creatures" of Parliament under section 91(24) of the *Constitution Act, 1967*. The Court of Appeal held that band councils were an "elected public authority, dependent on Parliament for its existence, powers and responsibilities whose essential power is to exercise […] government power" (para 19). As such, band councils exercise powers delegated by Parliament and also act from time to time as the agent of the Minister and the representative of the band with respect to the administration and delivery of federal programs.

[68] Then, in *R. v Paul Band*, 1983 ABCA 308 (CanLII), [1984] 1 C.N.L.R. 87, the Alberta Court of Appeal held at paragraph 20 that:

> Band councils are created under the *Indian Act* and derive their authority to operate qua band councils exclusively from that Act. In the exercise of their powers <u>they are concerned with the administration of band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister</u>. <u>They have no other source of power. Band councils are thus within the exclusive legislative jurisdiction and control of the Parliament of Canada over "Indians, and Lands reserved for Indians</u>" […].
>
> [Emphasis added.]

[69] These cases were discussed and endorsed in *Horse Lake* at paragraphs 12-19, 28-29. In that case, the Court compared band councils and municipal governments and opined that their distinctive characteristic was that action taken under their statutory authority involved powers of compulsion that are not possessed by individuals or corporations. Therefore, the *Charter* ought to apply to those powers – while it does not apply to regulate the relations between private corporations or individuals. The Court concluded that because band councils have the authority to govern and regulate persons and activities on reserves, they derive their authority from the *Indian Act* and that authority is greater than that of a corporation or a private citizen. In that capacity, they are similar to municipal councils and "the *Charter* should apply to the by-laws and actions of Band Councils; and members of Bands should be able to assert rights, such as the right to freedom of expression, against Band Councils" (at para 19). Therefore, under that understanding of section 32 of the *Charter* and its interaction with Indigenous governance, the *Charter* should apply to any decision, by-law or action of band councils made under powers identified pursuant to the *Indian Act* because in doing so, band councils are "using [their] statutory authority to regulate the life of [their] members" (at para 29).

[70] In *Clifton v Hartley Bay Indian Band*, 2005 FC 1030 at paragraphs 15-16, 44-45 [*Clifton*], it was argued before the Federal Court that regardless of whether a band is acting according to a custom or under the *Indian Act*, the decision is ultimately made pursuant to a council's authority under the *Indian Act* and therefore subject to the *Charter*. Justice O'Keefe agreed and ruled that an election regulation similar to that struck by the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 was invalid, even if the regulation in that case was enacted under the band's customary power.

[71] Justice O'Keefe's ruling was endorsed by this Court in several cases. Notably, in *Thompson v Leq'á:mel First Nation*, 2007 FC 707 [*Thompson*] at paragraph 8, Justice Strayer held that even where an election is not held under the *Indian Act*, but under regulations adopted under a band's custom or self-government authority, the *Charter* still applies because an elected band council exercises powers of governance under the *Indian Act*. If the right to vote or to be a candidate is discriminatory under section 15 of the *Charter*, such discriminatory result therefore arises under an act of Parliament. Consequently, section 32(1) of the *Charter* applies to the regulations because they are ultimately "in respect to all matters within the authority of Parliament."

[72] In *Woodward v Council of the Fort McMurray*, 2010 FC 337 [*Woodward*] at paragraphs 28–29, it was argued that since under section 2 of the *Indian Act*, a band could choose its council under the customs of the band, the band received its authority from its own custom and not from or in reliance to the Act. In doing so, the band is not exercising a "delegated authority from Parliament" and therefore cannot be considered to be a "government" for the purposes of section 32 of the *Charter*. The band recognized that the *Charter* applied to the "powers" of the band council, which was derived from the *Indian Act*, but not to the "creation" of the band council. Justice O'Reilly disagreed and applied Justice Strayer's reasons in *Thompson*, and held that the *Charter* did apply to the "powers" and the "creation" of a band council because a band council exercises its powers under the *Indian Act* and those powers arise under an act of Parliament.

[73] More recently, in *Cardinal v Bigstone Cree Nation*, 2018 FC 822 (CanLII), [2019] 1 FCR 3 [*Cardinal*] at paragraphs 48, 77 and *Linklater* at paragraph 33, this Court has also ruled that the

Charter applied to customary election regulations. Indeed, in *Cardinal* at paragraph 77, the Court recognized that Indigenous nations had an inherent right to self-government, but followed earlier precedents indicating that the Indigenous governmental powers must be exercised in compliance with the *Charter* (citing *Thompson* at para 8; *Woodward* at paras 28–29; *Clifton* at para 45).

[74] The *Charter*, through an early interpretation of section 32 within the context of Indigenous law as applicable and understood at that time, has therefore historically applied to rules enacted by Indigenous governments, regardless of whether the source of the power is the *Indian Act*, under custom or pursuant to Indigenous nations' inherent right to self-government. The rationale for that conclusion was that Indigenous governments were understood to be within the jurisdiction of Parliament and exercising all of their powers ultimately under an act of Parliament – the *Indian Act* – because the existence of band councils themselves were deemed to originate in, and be recognized by, the *Indian Act*. Alternatively, to the extent that Indigenous governments adopted rules under powers that were not included under the *Indian Act*, they still adopted rules that could be ultimately subject to Parliamentary oversight (if Parliament decided to enact legislation over those subject matters), and therefore were "in respect of all matters within the authority of Parliament" pursuant to section 32 of the *Charter*.

(b) *The current perspective that Indigenous governance does not originate from the Canadian Constitution*

[75] The conclusion that the *Charter* applies to Indigenous governance because its existence, and scope of powers, is subject to the authority of Parliament, is now much more controversial and has given rise to criticism and debate. Justice Favel rightly notes in *McCarthy* at paragraphs

117-118 that previous views relating to Indigenous governance have evolved and may be obsolete. Indigenous right to self-government was not granted by the Crown, and does not emanate from the *Constitution Act, 1867*, nor from the *Constitution Act 1982*:

> [117] From an Indigenous perspective, the right to self-government is not granted from the Crown, nor is it something that can be taken away (Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governance" 2007 National Centre for First Nations Governance 1 at 3). Rather, it is an inherent right consisting of powers gifted from the Creator that Indigenous nations have always possessed (Gordon Christie, "Obligations, Decolonization and Indigenous Rights to Governance" 27 Can JL & Jurisprudence 259 at 278; Canada, Report of the Royal Commission on Aboriginal Peoples, Vol 2, Restructuring the Relationship (Ottawa: Minister of Supply and Services, 1996) at 109).
>
> [118] From a Canadian legal perspective, Indigenous peoples' inherent right to self-government flows from their "special status" (*Kapp* at para 103, Bastarache J, dissenting). As I recently stated in *Labelle v Chiniki First Nation*, 2022 FC 456 [*Chiniki*]:
>
> > [10] The inherent jurisdiction of Indigenous nations is independent from the constitutional framework of Canada, though it has the same origin as section 35 of the Constitution Act, 1982… That is, it "arise[s] from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions" (*R v Van der Peet*, [1996] 2 SCR 507 at para 44).

[76] Given that Indigenous governance powers do not emanate from the *Indian Act*, but are merely recognized by it, the argument goes, are Indigenous laws and rules immune from the *Charter*?

[77] In *Band (Eeyouch) c Napash*, 2014 QCCQ 10367, the issue as to whether the *Charter* applied to by-laws adopted under an inherent right to self-government or residual sovereignty

was argued. The Court discussed at length case law and academic discussion on the issue, noting that the opinions expressed in the majority of cases and academic commentaries preferred an approach that subjected Indigenous governments to the *Charter* regardless of whether their rules were adopted pursuant to the *Indian Act*, or to their inherent right to self-government. Particularly, relying on the words of Professor Ghislain Otis (Ghislain Otis, "Aboriginal Governance with or without the Canadian Charter?" in Gordon Christie, ed., *Aboriginality and Governance: A Multidisciplinary Perspective from Québec* (Penticton, B.C.: Theytus Books, 2006) 265), the Court reasoned that section 32 required a broad interpretation:

> [77] After defining the purpose of his comments, the author questioned the compatibility of Aboriginal characteristics with the concept of individual freedom advocated by the Charter, because historically, it is generally admitted that a certain form of preponderance is given by the Canadian First Nations to collective interests and well-being.
>
> [78] According to Professor Otis, this vision should be modernized and it would be erroneous to consider that the Charter, as such, constitutes a threat to the particularism of the First Nations.
>
> [79] Nor does he subscribe to the idea that the conclusion should be that Aboriginal government must be excluded simply because section 32 is silent in that regard. Conversely, a broad interpretation is required, particularly because that power is exercised within one state and has the characteristics of that state. Hence, according to him:
>
> > When properly placed in its context, section 32 of the *Charter* looks much more like the expression of a general principle of good governance in Canada than like a simple list that textually limits the sphere of enforceability of constitutional rights and freedoms. Consequently, the crucial question for the purposes of section 32 should be whether the actions of an Aboriginal body acting pursuant to an Aboriginal or Treaty right amounts to the imposition on individuals of public power for the general good. If the answer is yes, then the *Charter* should be applicable depending on how section 25 is interpreted.

[78] In *Dickson v Vuntut Gwitchen First Nation*, 2021 YKCA 5 [*Dickson*] at paragraphs 83-99, an argument was made that the *Charter* did not apply to the Vuntut Gwitchen First Nation Constitution adopted under its right to self-government. In that case, the Court of Appeal held that the *Charter* did apply, because the Vuntut Gwitchen First Nation Constitution was adopted pursuant to various self-government agreements entered into with Canada and Yukon, and was recognized under legislation, and because Vuntut Gwitchen First Nation was exercising by its nature a "governmental" power that was part of the constitutional fabric and within the meaning of section 32 of the *Charter*. Therefore, the *Charter* ought to apply regardless of the source of the Indigenous nation's legislative power.

[79] Recently, the Québec Court of Appeal ruled that the *Charter* did apply to Aboriginal governments even if they are not directly contemplated within section 32 of the *Charter* (*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 [*Renvoi à la CAQ*] at paras 523-527). Relying on *Taypotat* at paras 38-39, the Court of Appeal held that even if Indigenous governing bodies did not act as federal or provincial public bodies when acting under their self-government powers, they were nevertheless engaged in a governmental activity and had to respect the rights of individuals. The Court of Appeal continued and held that even if the application of the *Charter* does impose certain limits on Indigenous governments in how they regulate services, "this is not tantamount to abrogating or derogating from the right to self-government or from other rights protected by s. 25 and s. 35" (at para 527).

[80] In the *McCarthy* decision, Justice Favel also ruled that section 32 of the *Charter* applied regardless of the source of the power exercised in that case. In his view, and I agree, the *Charter* applies because Indigenous governments carry on functions of government (at para 116), regardless of whether the source of power originates in the Indigenous nation's inherent right to self-government, or a federal statute.

(c) *The Charter applies to Indigenous governance regardless of the source of power*

[81] Justice Favel' ruling is consistent with the historical understanding of the extent of the meaning of section 32, as described above and discussed in earlier cases ruling that Indigenous governance powers originated from Parliament; and is consistent with a purposive interpretation of section 32 of the *Charter* today, indicating that the *Charter* protects every Canadian from the powers of compulsion of any government that has authority over them.

[82] A broad and purposive interpretation of section 32 of the *Charter* concluding that s. 32 applies to Indigenous governments is consistent with the historical view, in 1982, that the *Charter* ought to apply to Indigenous governments, who at the time were thought to exercise powers delegated by Parliament under the *Indian Act*, or at the very least were "in respect of all matters within the authority of Parliament" pursuant to section 32 of the *Charter*.

[83] That broad and purposive interpretation is also consistent with the case law noted above that the *Charter* also ought to apply to Indigenous rule-making because Indigenous governments

exercise a power of compulsion over their members that is not shared with individuals or corporate power.

[84] Finally, that interpretation is also consistent with the Supreme Court of Canada's decision in *Godbout* at paragraphs 47-48 albeit referring to municipal powers which, as discussed above, cannot be compared with Indigenous nations and their governance:

> [47] […] what I take to be an important idea governing the application of the Canadian *Charter* to entities other than Parliament, the provincial legislatures or the federal or provincial governments; namely, that where such entities are, in reality, "governmental" in nature -- as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform -- they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. This is not to say, of course, that the *Charter* applies only to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, by their nature, governmental. Indeed, it may be that particular entities will be subject to *Charter* scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as "governmental" *per se*; see, e.g., Re *Klein and Law Society of Upper Canada* (1985), 1985 CanLII 3086 (ON SCDC), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the *Charter* in performing what amount to governmental functions. Rather, it is simply to say that where an entity can accurately be described as "governmental in nature", it will be subject in its activities to *Charter* review. […]
>
> [48] The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than

> those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are -- as a simple matter of fact -- governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. […]
>
> [Emphasis added.]

(See also *Godbout* at paras 49-51; *Eldridge* v British *Columbia (AG)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*] at paras 42, 44, 49-51; *Greater Vancouver* at paras 14-21).

[85] Indeed, as held by the Federal Court of Appeal in *Taypotat* on the issue of the application of the *Charter* (the Supreme Court of Canada did not discuss nor overrule the Federal Court of Appeal's ruling on that issue; see also *Dickson* at paras 86-87):

> [36] […] Moreover, the Council is entrusted with the management of numerous federal government programs destined to Indian members of the First Nation. It consequently largely acts as a government under federal legislation and in matters within the authority of Parliament.
>
> […]
>
> [38] […] As citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens. This includes protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.
>
> [39] Moreover, the rights and freedoms set out in the Charter would be ineffectual if the Council members could be selected in a manner contrary to the Charter. I have no doubt that if a First Nation adopted a community election code restricting eligibility to public office to the male members of the community, such a code

> would be struck down pursuant to section 15 of the Charter. To decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens.

[86] In my view, and as explained above, the source of the Indigenous government's authority is not relevant. Whether that power is delegated under the *Indian Act*, merely "recognized" by the *Indian Act*, or originating from the Indigenous nation's inherent right to self-government, any rule resulting from the exercise of that power is compulsory on the nation's members and the decision is "governmental" in nature. With the advent of the *Charter*, it was first thought that the *Charter* applied to Indigenous governments because they fell within the powers of Parliament. While that theory may be erroneous, a purposive interpretation of the *Charter* as a whole signals that the intent was always to grant all Canadians equal rights that may be asserted against their own government, at all levels. That also ought to apply to any Indigenous individual in relation to their nation's governance.

[87] A broad interpretation of section 32 of the *Charter* that would subject Indigenous laws to its limitations, regardless of the source of the Indigenous power, is also consistent with other provisions of the Constitution, interpreted together, including the *Charter* itself. The conclusion that the *Charter* applies to Indigenous governments is buttressed by section 25 of the *Charter* and section 35 of the *Constitution Act, 1982* which provide:

Constitution Act, 1982	***Loi constitutionnelle de 1982,***
Part 1	**Partie 1**
Canadian Charter of Rights and Freedoms,	***Charte canadienne des droits et libertés***

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

Maintien des droits et libertés des autochtones

25. Le fait que la présente Charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés – ancestraux, issus de traités ou autres – des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords de règlement de revendications territoriales ou de ceux susceptibles d'être ainsi acquis.

PART II

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of aboriginal peoples of Canada

(2) In this Act, **aboriginal peoples of Canada** includes

PARTIE II

Droits des peuples autochtones du Canada

Confirmation des droits existants des peuples autochtones

35 (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de peuples autochtones du Canada

(2) Dans la présente loi, ***peuples autochtones du Canada*** s'entend notamment

the Indian, Inuit and Métis peoples of Canada.	des Indiens, des Inuit et des Métis du Canada.
Land claims agreements	**Accords sur des revendications territoriales**
(3) For greater certainty, in subsection (1) **treaty rights** includes rights that now exist by way of land claims agreements or may be so acquired.	**(3)** Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
Aboriginal and treaty rights are guaranteed equally to both sexes	**Égalité de garantie des droits pour les deux sexes**
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.	**(4)** Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

[88] Section 35 of the *Constitution Act, 1982*, is included in part II of that constitutional enactment. It lies outside of the *Charter*, which is Part I of the *Constitution Act, 1982*. Section 35 recognizes and affirms existing aboriginal and treaty rights, which may include a form of autonomy and self-government to Indigenous nations (*Renvoi à la CAQ* at paras 363-364, 468-494, 514; *McCarthy* at paras 119, 125, 149, *R. v Kapp*, 2008 SCC 41 [*Kapp*] at paras 103, 105; See also Canada, Report of the Royal Commission on Aboriginal Peoples, Vol. 2, Restructuring the Relationship (Ottawa: Minister of Supply and Services, 1996) at 214-222 (conclusion No. 17) [Report of the RCAP]; *R. v Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 SCR 821

[*Pamajewon*] at paras 24-25; *Mitchell v M.N.R., 2001 SCC 33 (CanLII),* [2011] 1 SCR 911 at paras 165, 169).

[89] Section 25 of the *Charter* provides that the protection of "certain rights and freedoms" in the *Charter* will not "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada […]". Section 25 is *within* the *Charter* and therefore recognizes Indigenous nations' inherent right to self-government.

[90] A purposive interpretation of section 32, and of the *Charter* as a whole, requires that Indigenous governments be subject to the *Charter*. First, it allows Indigenous individuals to benefit from the same protection as any other Canadian, against any power of compulsion adopted by any level of government that has jurisdiction over them. As opined by Bastarache J. in *Kapp*, "[t]here is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme" (*Kapp* at para 99).

[91] Including Indigenous governments within section 32 also provides important content to the collective protection of Indigenous nations under section 25 of the *Charter*. In other words, the extent of the meaning and content of section 25 would be diminished if Indigenous governments were not subject to the *Charter*. Section 25, from a collective standpoint, is not necessary within the *Charter*, because those collective rights are already protected under section 35 of the *Constitution Act 1982*.

[92] If Indigenous governments are not included within the *Charter* under section 32, section 25 could become somewhat redundant.

[93] On the other hand, if section 32 applies to Indigenous governments, then the content of section 25 becomes very important and allows greater autonomy to Indigenous nations, to the extent that the laws that are adopted under their powers of governance can meet the legal thresholds required to be recognized as an "aboriginal, treaty or other right". For example, in *Woodward* at paragraphs 25-26, Justice O'Reilly first held that the *Charter* applied to a customary election code, and then applied section 25 to determine if the election code could prevail over the *Charter*. He ruled in that case that section 25 of the *Charter prima facie* did protect against any derogation from aboriginal and treaty rights, which could insulate customary practices from *Charter* scrutiny. However, in that particular case, he held that the band's customary election regulations did not reflect a customary practice. Section 25 could therefore not protect the customary election regulations from *Charter* scrutiny in that case.

[94] In *Dickson*, an argument was also made that section 25 applied, thereby limiting certain rights of the *Charter*. The Yukon Court of Appeal held that indeed, section 25 did shield some elements of the Nation's Constitution because they represented the traditions and customs relating to governance and leadership, and constituted the exercise of a right that in its modern form "pertain[s] to the aboriginal peoples of Canada" (at para 147; see also paras 143-162).

[95] In the *McCarthy* decision at paragraphs 148-149, Justice Favel ruled that section 25 could not "shield" the Election Regulations (the same that are impugned in this case) because they

were not a custom enacted pursuant to the First Nation's inherent right to self-government, as the alleged custom was not supported by a broad consensus of the community going to the "distinctive, collective and cultural identity of an aboriginal group" (*McCarthy* at para 101).

[96] The interpretation of section 32 suggesting that the *Charter* applies to Indigenous governments in all their decision making is also bolstered by section 28, which is also *within* the *Charter* itself. Section 28 (like section 35(4)) guarantees all rights equally to male and female, regardless of any other provision of the *Charter* (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII) [*Beckman*] at para 98). Clearly, the intent is to limit the application of some sections, notably section 25. Indeed, even if a custom could be adopted, and preserved notwithstanding a limit of a *Charter* right, such custom would have to cede before the *Charter* if the impact of the breach was in relation to sexual equality. *Dickson* is a good example of that. While custom can protect a band's decision on governance in relation to the residence of its leaders, it could not, for example as ruled in the *McCarthy* decision, limit women's right to vote.

[97] On the other hand, if the *Charter* did not apply to Indigenous governments' inherent right to self-government, some laws limiting women's access and participation in government could be shielded from *Charter* protection. To paraphrase the Federal Court of Appeal's reasons in *Taypotat* at paragraph 38, it would be incongruent to construe the *Charter* in such manner as to exclude some Canadian citizens who are as much entitled to the protections and benefits of the rights and freedoms and preclude them from claiming the same rights as others from their own

governments, leaving them in a jurisdictional ghetto in which they are entitled to less rights than all other Canadian citizens.

[98] The conclusion that section 32 applies to Indigenous governance regardless of the source of power is also bolstered by the findings and recommendations of the Report of the RCAP where the Commission discussed the issue as to whether the *Charter* applied to Indigenous governments exercising inherent powers under section 35(1) of the *Constitution Act, 1982* (as opposed to delegated powers under the *Indian Act*).

[99] The Commission first considered that the *Charter* should apply to Indigenous governments because all Canadians should enjoy the same protection against every government entity in Canada. Section 32 of the *Charter* is therefore not exhaustive and its main purpose is to indicate that governments rather than private individuals are subject to it (Report of the RCAP at 216-217):

> Viewed in this light, then, the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the *Charter* in their actions. While the section identifies some of the main government bodies subject to the *Charter*, it does not state that the *Charter* applies exclusively to those bodies or provide a complete list of government bodies affected. In effect, then, the section leaves open the possibility that there are other government bodies, not mentioned in the section, that are subject to the *Charter*'s provisions. The tacit recognition of an Aboriginal order of government in section 35(1) fulfils that possibility.

[100] The Commission then considers the opposite approach that suggests that Indigenous governments should not be subject to the *Charter*, because section 35(1) of the *Constitution Act, 1982* recognizes the Aboriginal and treaty right to self-government, and that section is located

outside the *Charter*. Indigenous governments, under that approach, would therefore be subject to international human rights standards but not to Canadian courts for alleged violations of the *Charter*. This opposite approach also identifies section 25 of the *Charter* as protecting self-government, because it is an "aboriginal, treaty or other right" and that the *Charter* cannot "abrogate or derogate from" the exercise of inherent powers of Aboriginal self-government. Because any *Charter* limitation would constitute an abrogation or derogation from self-government powers, it follows that the *Charter* cannot apply to Aboriginal governments if that approach was adopted.

[101] The Commission concludes that the better view is an intermediate one, but where the *Charter* does apply to Indigenous governments in the exercise of any power. Indeed, "all people in Canada are entitled to enjoy the protection of the *Charter's* general provisions in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved. […] Aboriginal governments occupy the same basic position relative to the *Charter* as the federal and provincial governments" (Report of the RCAP at 219). However, a broad interpretation of section 25 of the *Charter* must be given, so that the application of the *Charter* to Indigenous governments allow "considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions" (Report of the RCAP at 219).

[102] Consequently, the *Charter* applies to Indigenous governments when exercising their public powers that affect their members. To the extent that a *Charter* right is breached, the Indigenous government can rely on section 25 and assert the nation's right to self-government over the *Charter* breach, if the rule in question represents a broad consensus of the community

going to the "distinctive, collective and cultural identity of an aboriginal group" (*McCarthy* at paras 101, 148; *Kapp* at para 89; *Pamajewon* at paras 24-25; *R. v Van der Peet* [1996] 2 SCR 507 at para 46; *Renvoi à la CAQ* at para 485; *Dickson* at paras 67, 123). If the Indigenous government succeeds in asserting that custom, then the rule is "shielded" from the *Charter* breach. However, even if a consensus that would otherwise shield the rule from the *Charter* exists, the rule remains subject to the *Charter* if it results in a situation where discrimination arises on sexual grounds, under section 28 of the *Charter*.

[103] As opined by Deschamps J. in *Beckman* at paragraph 98, Aboriginal and treaty rights of Aboriginal peoples are recognized in section 35 of the *Constitution Act, 1982*. Section 25 of the *Charter* is also within the *Constitution Act, 1982* and "the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples." Therefore the *Charter* ought to apply, but sections 25 of the *Charter* and 35 of the *Constitution Act, 1982* should not be interpreted, "in a way that brings them into conflict with one another, but rather as being complementary."

[104] There are additional reasons why the *Charter* applies in this particular case. The same Voting Prohibition was struck by Justice Favel in the *McCarthy* decision where, as discussed above, I agree with his reasons, including on the application of the *Charter*. On the facts of this particular case, the impugned Election Regulations are of a hybrid and sparse nature (*Shirt #1* at para 18; *Shirt v. Saddle Lake Cree Nation*, 2022 FC 321 at para 3). While they are "customary" in the sense that the elections are not conducted under the *Indian Act*, the Election Regulations do include by reference sections 73 to 78 of the *Indian Act*. Moreover, the result of the election is

that the elected council will be recognized by the federal government under section 2 of the *Indian Act* as representing SLCN #462, to adopt by-laws and to manage government programs. As held by Justice Favel at paragraph 133, and which is equally applicable in this case, SLCN # 462/SLCN#125 exercises at least some of its governmental authority within the "sphere of federal jurisdiction" and acts as a "government entity", which is sufficient in this case to rule that the *Charter* applies (see also *Taypotat* at para 36).

B. *The Voting Prohibition violates section 15 of the Charter*

[105] Both parties conceded that, if section 32 of the *Charter* applies to the Voting Prohibition, it violates section 15 of the *Charter* and Justice Favel's analysis in the *McCarthy* decision must be followed.

[106] I agree with Justice Favel and his analysis, but it is still necessary to engage in a section 15 analysis on the facts of this case.

[107] The Supreme Court of Canada recently restated the test applicable to section 15 of the *Charter*. In *R v Sharma,* 2022 SCC 39 at paragraph 28, the SCC held that the test for assessing a section 15 claim required the claimant to demonstrate that the impugned law or state action:

> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage [citations omitted]

[108] In this case, the Voting Prohibition does create a distinction based on the enumerated ground of sex, which denies women the right to vote, while men are not impacted by the same prohibition.

[109] I accept the Applicant's evidence that the prohibition of a fundamental right such as the right to vote has the effect of reinforcing a disadvantage for Indigenous women labelled as members who regained status with Bill C-31. Section 15 is therefore engaged. This sex-based distinction has created and continues to create adverse, systemic effects for SLCN #462 women and their descendants.

[110] Indeed, as claimed by the Applicant in their written representations at paragraph 74, Bill C-31 women have been treated as though they are not "truly Indian" or "not Indian enough". The Voting Prohibition perpetuates discrimination and trauma carried by women of SLCN #462 who were identified as "Red Ticket Indians."

[111] I therefore conclude that the two steps of the test are met and that the Voting Prohibition infringes section 15 of the *Charter*. I also note that the Voting Prohibition in this case has also been held to infringe section 15 of the *Charter* in the *McCarthy* decision at paragraphs 155, 170, as well as in *Scrimbitt v Sakimay Indian Band Council (T.D.)*, 1999 CanLII 9381 (FC) [*Sakimay*].

C. *The violation cannot be justified under section 1 of the Charter*

[112] The Respondent has not made any attempt to justify the section 15 *Charter* breach nor submitted any argument to that effect. Instead, the Respondent conceded at the hearing that if the *Charter* applied in this case, then Justice Favel's analysis in the *McCarthy* decision also applied and the breach could not be justified under section 1.

[113] I agree.

[114] As held by Justice Favel, the legal framework to evaluate if a violation can be justified under section 1 is set out in *Frank v Canada (AG),* 2019 SCC 1 (CanLII), [2019] 1 SCR 3 at paragraphs 36-37 and in *R. v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at 138-40, 26 DLR (4th) 200.

[115] In this case, and as argued by the Applicant, the *Charter* breach cannot be justified under section 1. The limitation is not prescribed by law because the Election Regulations are not a custom (*McCarthy* at para 171; see also *Shirt #1* at paras 34, 41-42; *Sakimay* at paras 65-66). In fact, as argued by the Applicant, the Election Regulations appear to go against the Nehiyaw principle that all members must be treated equally.

[116] In any event, and as in the *McCarthy* decision, the SLCN #462 has not put forward any evidence that could potentially justify the breach, except that SLCN #462 does not receive any funding for Bill C-31 members. That evidence on its own is not sufficient to justify the breach.

[117] Given that SLCN #462 has the burden of proof on the justification of a *Charter* breach, and that it has not provided the Court with sufficient evidence or argument on the issue, the Voting Prohibition is not justified in this case.

D. *Section 25 and 28 of the Charter*

[118] Regardless of the extent of the meaning of section 25 of the *Charter*, and whether or not the Voting Prohibition is a custom of SLCN #462 or not, the Voting Prohibition is not shielded because of the operation of section 28 of the *Charter*.

[119] Section 28 of the *Charter* provides:

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	**28** Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

[120] Section 28 is intended to protect individuals from discrimination on the basis of sex, more than any other section 15 grounds.

[121] In this case, if SLCN #462 was able to assert that the Voting Prohibition constitutes a "custom", it could in theory shield the custom from the application of a *Charter* breach. For example, an established custom that eligibility to vote is at 21 years of age could be protected from an assertion that the custom is discriminatory on the basis of age.

[122] However, section 28 provides that "[n]otwithstanding anything in this Charter", equality must be provided to male and female persons. Section 25 is, as stated above, within the *Charter* and therefore in "this *Charter*" pursuant to section 28. Therefore, section 28 precludes distinctions on the basis of sex, that would not otherwise be protected under a section 25 asserted "aboriginal, treaty or other right". As held by my colleague Justice Favel in *McCarthy*, with which I agree:

> [140] First, section 25 cannot apply to shield the Bill C-31 Voting Policy because, as WLFN concedes, the Bill C-31 Voting Policy discriminates on the basis of sex (*McIvor* at paras 87-94). Section 28 of the *Charter* states that "notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." As noted by Justice Bastarache in *Kapp*:
>
> > [97] Is the shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "notwithstanding anything in this Charter". Second, it is restricted to its object, placing *Charter* rights and freedoms on a juxtaposition to aboriginal rights and freedoms *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect.
> >
> > [Emphasis added.]
>
> [141] Having found that the *Charter* applies to WLFN's Election Regulations, section 28 clearly limits the application of section 25 with respect to the Bill C-31 Voting Policy.

[123] Therefore, even if the Voting Prohibition had been a custom in this case, section 25 could not have shielded the custom from the application of the *Charter*, because of the application of section 28 of the *Charter*.

E. *Remedies*

[124] The Court quashes and sets aside the decision of the Election Officer and declares that the Voting Prohibition is unconstitutional and of no force or effect.

[125] The Court suspends the declaration of invalidity so that SLCN #462 may amend the Election Regulations in a manner that reflects the broad consensus of the SLCN #462 membership within six months in order to prepare for the next election. If no broad consensus can be reached, the next election will be held according to the current Election Regulations, except that the terms "except Red Ticket Indians" will be struck (unless a broad consensus emerges later than within the next six months but before the next election, on more wholesome amendments to the Election Regulations, but that also remove the Voting Prohibition). The Applicant and all other members in a similar situation are eligible to vote. In other words, if an amendment is not adopted that reflects a broad consensus of the members (within 6 months or anytime before the next election), section 2(a) of the Election Regulations applicable to the next election will read in these words:

> Any Band member, over the age of 21 years on the day of the election, whether living on the Reserve or not, shall be eligible to cast a vote~~; with the exception of Red Ticket Indians~~.

[126] The Court will not order a new election. While the Applicant has submitted that writs of *quo warranto* and *mandamus* are requested, in my view, it is not in the best interest of SLCN # 462/SLCN #125 to hold another election. While the Applicant and many members were not able to vote, a new election would disenfranchise those that saw their 2022 vote annulled as a result of a new election being called.

[127] In relation to the Applicant's request for a writ of *quo warranto* to quash the June 2022 election and remove the officials currently in place from office, the following questions must be answered in the affirmative (*Gagnon v Bell*, 2016 FC 1222 at para 45):

1. Does the Court have jurisdiction over the person holding the office?

2. Does the Applicant meet the rules for granting the remedy of *quo warranto* as set out in *Jock v R*, 1991 CarswellNat 126 (FCTD) [*Jock*]?

3. Does the person purporting to be holding the office lack a legal basis to hold that position?

[128] To succeed in setting aside an election, the Applicant has to demonstrate that the vote was not conducted in accordance with the electoral practice, which is not the case in this matter.

[129] In *Assiniboine v Meeches*, 2013 FCA 177, the FCA indicated that two requirements were required in order to set aside an election:

> [63] As a general rule, and contrary to an impeachment, an election will not be set aside if the results do not appear to have been affected by the alleged irregularities. This rule was put forward in *Camsell v. Rabesca*, 1987 CanLII 8600 (NWT SC), [1987] N.W.T.R. 186 and in *Flookes and Longe v. Shrake* (1989), 1989 CanLII 3220 (AB KB), 100 A.R. 98, 70 Alta. L.R. (2d) 374 (Q.B.), and it has been affirmed by the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76 ("*Opitz*") at paras. 55 to 57. The rule was expressed as follows in *Flookes* and *Longe v. Shrake*, above:
>
> > So the rule, then, on a review of these authorities and subject to statutory modification, could be stated, in my view, as follows: that the vote should be vitiated only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might have been different; and secondly, that the vote could not be said to have been a vote, that is, it was not conducted generally

> in accordance with electoral practice under existing statutes.

[130] Indeed, in *Standingready v Ocean Man First Nation*, 2021 FC 434, the Court held that a writ of *quo warranto* can only be issued where illegality related to the eligibility to hold office is demonstrated and is not on the basis of political grievances.

[131] In this case, the current Council has been legitimately elected in compliance with the applicable Election Regulations that were valid at the time, including the Voting Prohibition, and which benefit from the presumption of constitutional validity (*Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10 at para 79). Since the June 2022 election process was administered according to the Election Regulations at the time which provided at section 2 (a) that Red Ticket Indians were excluded from the eligibility to vote, the present Chief and Council were elected legally and they do not currently hold office illegally. There is therefore no basis to order a new election.

[132] In relation to the Applicant's request for a *mandamus* directing that the SLCN #462/SLCN #125 hold a new election within 90 days of the Court's decision, the applicable test comprises of eight (8) elements which are set out in *Apotex Inc v Canada (Attorney General) (C.A.)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 at page 766 and, more recently, discussed in the immigration context in *Dragan v Canada (Minister of Citizenship and Immigration) (T.D.)*, 2003 FCT 211 (CanLII), [2003] 4 F.C. 189.

[133] The test is not met in this case: there is no (1) a public legal duty to act, (3) clear right to the performance of the duty and (8) the balance of convenience does not favour issuance of the order sought. First, *mandamus* is available to compel the performance of a statutory duty. There is no statutory duty on the Election Officer to call a new election in this case, given that the 2022 election was conducted according to the Election Regulations and that the Voting Prohibition was valid at the time. There is therefore no clear right to the performance of the duty (to call a new election) and as stated, the balance of convenience does not favour a new election.

[134] The Court directs counsel to provide additional submissions on the matter of costs as set forth in the Judgment below.

VII. Conclusion

[135] For all these reasons, the application for judicial review is allowed.

JUDGMENT in T-1153-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in T-1153-22 is allowed. The decision of the Election Officer is unreasonable because it does not represent a proportionate balancing between the *Charter* rights and the object of the Election Regulations.
2. The *Charter* applies to SLCN #462/SLCN #125's leadership selection process as set out in the Election Regulations.
3. The Voting Prohibition is contrary to subsection 15(1) of the *Charter* and cannot be saved by section 1.
4. Section 25 of the *Charter* cannot shield the Voting Prohibition because it is not a custom of the band and in any event, by operation of section 28 of the *Charter*.
5. The Court declares the Voting Prohibition unconstitutional and of no force and effect. The declaration of invalidity is suspended for six (6) months after the date of this judgment.
6. The Court directs further submissions on costs. The Applicant will serve and file their submissions on costs by September 29, 2023. The Respondent will serve and file its submissions on costs by October 13, 2023. The submissions will not exceed 10 pages.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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